IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

OLIVIA McCOOL GEESLIN — PLAINTIFF

vs. — Civil Action No. 1:97cv186-D-A

NISSAN MOTOR ACCEPTANCE CORPORATION — DEFENDANT/ THIRD PARTY PLAINTIFF

vs.

LOSS RECOVERY, INC. and MIKE SHAMBLIN d/b/a Hunter Recovery — THIRD PARTY DEFENDANTS

MEMORANDUM OPINION

By order dated May 29, 1998, United States Magistrate Judge S. Allan Alexander granted the plaintiff's motion for a protective order and denied the defendant's motion to disqualify plaintiff's counsel. Geeslin v. Nissan Motor Acceptance Corp., Civil Action No. 1:97cv186-D-A (N.D. Miss. May 29, 1998). The defendant, aggrieved with the decisions of the Magistrate Judge, filed objections to that order with this court on June 11, 1998. After having considered the order of the Magistrate Judge and the submissions of the parties, the undersigned is of the opinion that the order is neither clearly erroneous nor contrary to law. The undersigned shall not modify or set aside Judge Alexander's order of May 29, 1998.

I. DISCUSSION

. Factual Background

This court recently issued a memorandum opinion and order in this matter, and briefly set forth the facts underlying this cause.

> On July 1, 1995, the plaintiff Olivia Geeslin leased a 1995 Nissan Altima automobile. Pursuant to the lease agreement with the defendant Nissan Motor Acceptance Corporation ("Nissan"), Ms. Geeslin was to make thirty-six (36) regular monthly payments of $253.75, including tax. As of May 30, 1997, although the plaintiff had made twenty-one (21) of the scheduled payments, she was nevertheless two months behind in her payments. On or about April 25, 1996, Nissan sent the plaintiff a "Notice of Default" noting her arrearage. Over the next thirteen months, the plaintiff continued to make her regular monthly payments but did not satisfy the two-months arrearage.
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> On or about May 19, 1997, Nissan contracted the third party defendant Loss Recovery, Inc. ("Loss Recovery") to repossess Ms. Geeslin's automobile. Loss Recovery then subcontracted the repossession work to third party defendant Mike Shamblin, d/b/a Hunter Recovery. On the evening of May 30, 1997, while the plaintiff and her husband were eating dinner at a local country club, Hunter Recovery repossessed the vehicle from the plaintiff's garage. According to the plaintiff, the garage door was down at the time she left the vehicle there at about 7:00 p.m., and was down when she returned home at about 10:00 p.m. After returning home and opening the garage door, she discovered that the vehicle was gone. Unnumbered Exhibit to Plaintiff's Motion, Affidavit of Olivia Geeslin, ¶¶ 14, 19-20.

Geeslin v. Nissan Motor Acceptance Corp., Civil Action No. 1:97cv186-D-A (N.D. Miss. June 3, 1998) (Memorandum Opinion). The plantiff's husband, Gary L. Geeslin, is a practicing attorney and is serving as her counsel in this cause. The defendant, believing that Mr. Geeslin had discoverable information regarding this cause, noticed plaintiff's counsel for deposition. Additionally, the defendant moved to have Mr. Geeslin disqualified as counsel for the plaintiff. After receiving notice of the deposition, the plaintiff moved this court for a protective order to prevent Mr. Geeslin's deposition. The Magistrate Judge, in a single opinion and order, granted the plaintiff's motion for a protective order and denied the defendant's motion to disqualify counsel. The defendant now seeks review of the order of the Magistrate Judge regarding these two motions.

B. Standard of Review

Proper review by this court of the Magistrate Judge's order regarding nondispositive matters is pursuant to Fed. R. Civ. P. 72(a) and is triggered by the filing of "objections" to the

order within ten days of its entry. Fed. R. Civ. P. 72(a). This court's review of the Magistrate Judge's order is pursuant to that rule, and this court will only modify or set aside that order if it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); see also Jones v. Johnson, 134 F.3d 309, 311 (5th Cir. 1998); United States v. Dees, 125 F. 3d 261, 263 (5th Cir. 1997).

C. Plaintiff's Motion for Protective Order

The defendant sought to depose plaintiff's counsel in order to obtain information relative to this lawsuit. It does not appear in dispute that Mr. Geeslin is in the possession of facts and information that is traditionally discoverable from an eyewitness. Nevertheless, the Magistrate Judge determined that Mr. Geeslin, as the spouse of the plaintiff, is not competent to testify in this cause unless both the plaintiff and Mr. Geeslin consent. Fed. R. Evid. 601; Miss. R. Evid. 601(a). In making her ruling, the Magistrate Judge noted that

> [b]ecause the court finds that the state law proviso of [Federal Rule of Evidence] 601 requires application of Mississippi state law, and Mississippi law does not recognize a spouse as a competent witness under these circumstances unless both spouses consent, the court concludes that defendant cannot compel plaintiff's counsel to appear for deposition in this matter.

Geeslin v. Nissan Motor Acceptance Corp., Civil Action No. 1:97cv186-D-A (N.D. Miss. May 29, 1998) (Order Granting Motion for Protective Order and Denying Motion to Disqualify Plaintiff's Counsel, p. 7). This court wields substantial discretion in deciding the competency of a witness. United States v. Blankenship, 923 F. 2d 1110, 1116 (5th Cir. 1991) ("The trial court has complete discretion to decide whether a witness is competent to testify."); Gurleski v. United States, 405 F.2d 253, 267 (5th Cir.1968), *cert. denied*, 395 U.S. 977, 981, 89 S.Ct. 2127, 2140, 23 L.Ed.2d 765, 769 (1969).

In its objection to this portion of the Magistrate Judge's order, the defendant argues that

1) in light of the seminal Erie[1] decision, Mississippi procedural laws - such as state rules of competency and evidence - cannot apply to this diversity action; and 2) even if the state law of competency is applied in this case, Mississippi's competency rule does not apply to any discovery relevant to the plaintiff's federal claims under the Fair Credit Reporting Act. This court is not persuaded that these arguments require modification of the Magistrate Judge's order. It is apparent upon a reading of her order that she did not apply Mississippi's rules of competency because of Erie but because they are adopted by reference by federal procedural law, *i.e.*, the Federal Rules of Evidence. The relevant rule provides:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Fed. R. Evid. 601. As the Magistrate Judge noted, "State law" relevant to virtually all of the plaintiff's claims is the law of Mississippi. The relevant provision of Mississippi evidentiary law dictates:

> Every person is competent to be a witness except as restricted by the following:
>
> (a) In all instances where one spouse is a party litigant the other spouse shall not be competent as a witness without the consent of both . . .

Miss. R. Evid. 601(a). While there are two exceptions to this rule, neither of them apply in this instance. Miss. R. Evid. 601(a)(1),(2). A straightforward application of Fed. R. Evid. 601 directs this court to apply Mississippi rules of competency. Even though its application is not dictated by Erie, the standards of Miss. R. Evid. 601(a) nevertheless apply. As such, the

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[1] Gasperini v. Center for Humanities, Inc., 518 U.S. 415, ----, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659 (1996) ("Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law"); Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938).

Magistrate Judge correctly determined that Mississippi's competency rule regarding spousal testimony was properly applied in the case at bar.

Insofar as the defendants charge that these provisions do not prevent discovery of matters pertaining to the plaintiff's federal law claims under the Fair Credit Reporting Act, this court must agree. Longoria by Longoria v. Wilson, 700 F. 2d 300, 304 (5th Cir. 1984) (" Although it is true that under Fed. R. Evid. 601 the competency of a witness is to be 'determined in accordance with State law,' that rule is limited to cases where 'State law supplies the rule of decision,' or diversity cases."). Nevertheless, the undersigned cannot say that the Magistrate Judge's ruling is "clearly erroneous of contrary to law" for this reason. In light of this court's recent decision on the defendant's motion for summary judgment, the only remaining federal law issue, *i.e.*, the only issue that Mr. Geeslin would be competent to testify regarding, is any Fair Credit Reporting Act claim which arose *after* September 30, 1997. Geeslin v. Nissan, Civil Action No. 1:97cv186-D-A (N.D. Miss. June 3, 1998) (Memorandum Opinion, p.11). Nissan did not place information before the Magistrate Judge reflecting that Mr. Geeslin has in his possession discoverable information regarding this claim. Indeed, in that Mr. Geeslin has apparently represented his wife in this matter since the repossession in July of 1995, any information that he may have is likely protected by attorney-client privilege. There is no indication that he has any discoverable information obtained independently from the attorney-client relationship. The undersigned cannot say that the Magistrate Judge was either clearly erroneous or contrary to law in ruling upon the plaintiff's motion for a protective order.

. Defendant's Motion to Disqualify Counsel

The defendant also objects to that portion of the Magistrate Judge's order which denies

the defendant's motion to disqualify Mr. Geeslin as the plaintiff's legal counsel in this matter. The basis of Nissan's motion arises from the Mississippi Rules of Professional Conduct:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of the legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

Miss. R. Prof. Cond. 3.7(a). The Mississippi Bar has counseled that "the lawyer witness rule has been historically subject to tactical abuse and should be subject to strict scrutiny." Opinion No. 242 of the Mississippi State Bar (Apr. 2, 1998).

As an initial matter, the court notes that this rule does not prevent an attorney from representing a client through the entire course of a litigation, but merely prohibits representation "*at a trial.*" Miss. R. Prof. Cond. 3.7(a). Other rules which concern conflicts of interest govern when an attorney's potential testimony may be adverse to his client. Opinion No. 164 of the Mississippi State Bar (Jun. 23, 1989) ("[A] lawyer representing a client in pending litigation may continue the representation after he learns that he may be called as a witness until it is apparent that the testimony is or may be prejudicial to the client."). That being stated, the court turns to the application of this rule to the case at bar.

As this court has already ruled that the Magistrate Judge's order was not clearly erroneous nor contrary to law with regard to the plaintiff's motion for a protective order, the undersigned cannot say that she was clearly erroneous or contrary to law in denying the defendant's motion to disqualify Mr. Geeslin as plaintiff's counsel. As he may not be called to testify regarding any matter related to a claim of the plaintiff arising under state law by virtue of competency rules and

as there is no indication that he possesses any discoverable information regarding the plaintiff's federal law claim, Mr. Geeslin is not "likely to be a necessary witness" in this matter. The Magistrate Judge was neither clearly erroneous nor contrary to law in her decision in this matter and the undersigned shall not disturb her order.

. Conclusion

Upon careful review of the parties submissions and of the record in this cause, the undersigned is of the opinion that the contested May 29th order of the Magistrate Judge should not be disturbed. This court cannot say that any portion of this order of Magistrate Judge was either clearly erroneous or contrary to law. The objections of the defendant shall be overruled.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

_____
United States District Judge

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ORDER OVERRULING OBJECTIONS TO ORDER OF THE MAGISTRATE JUDGE

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the defendant's objections to the order of United States Magistrate Judge S. Allan Alexander dated May 29, 1998, entitled "Application for Review of Magistrate Judge's Order" are hereby OVERRULED;

2) the decision of United States Magistrate Judge S. Allan Alexander dated May 29, 1998, granting the plaintiff's motion for a protective order and denying the defendant's motion to disqualify plaintiff's counsel is hereby AFFIRMED. This court declines to modify or set aside that order of the Magistrate Judge.

SO ORDERED, this the _____ day of April 2001.

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United States District Judge